

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MICHAEL P. AND SHELLIE GILMOR,
et al.,

Plaintiffs,

vs.

PREFERRED CREDIT CORPORATION,
et al.,

Defendants.

Case No. 10-0189-CV-W-ODS

EXHIBIT AD

**PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO MOTION TO DECERTIFY
CLASS AS TO DEFENDANTS COUNTRYWIDE HOME LOANS, INC.
AND BAC HOME LOANS SERVICING, L.P.**

Steven and Ruth Mitchell v. Residential Funding Corporation
Volume I

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STEVEN and RUTH MITCHELL,)
et al.,)
)
 Respondents,)
)
vs.) No.
)
RESIDENTIAL FUNDING)
CORPORATION, et al,)
)
 Appellants.)

AD

IN THE CIRCUIT COURT OF MISSOURI
JACKSON COUNTY, DIVISION 4
Honorable Justine E. Del Muro, Judge

STEVEN and RUTH MITCHELL,)
et al.,)
)
 Plaintiffs,)
)
vs.) No. 03CV-2200489
)
RESIDENTIAL FUNDING)
CORPORATION, et al.,)
)
 Defendants.)

RECORD ON APPEAL - TRANSCRIPT

VOLUME I (of VI)

Pages 1 - 731

Julie M. DelPercio, Certified Reporter #516
Official Court Reporter, Division 4
Sixteenth Judicial Circuit of Kansas City

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<p>1 statute. It's very much facilitating the jury's 2 ultimate determination.</p> <p>3 MR. SKEENS: I'm sorry. The HUD-1s tell 4 you what happened in the transactions. That is 5 what this case is all about. All Mr. Arnold is 6 trying to do now is regurgitate what they argued 7 at class certification. You have this horde of 8 individualized inquiries that you have to dissect 9 every one of these loans beyond what the HUD-1 10 says, and the Court has already ruled in making 11 this a class action that we don't have these 12 individualized inquiries, that these are common 13 and typical issues and that the HUD-1 tells you 14 what was charged in each of these incidents and 15 that is the document that proves the case.</p> <p>16 So we don't need Professor Randolph to say, 17 well, the HUD-1 may say X but really you've got to 18 go do this, this and this. That is not the proper 19 source of expert testimony, it's a legal opinion, 20 it will confuse the jury, he ought not be allowed 21 to testify.</p> <p>22 MR. ARNOLD: Your Honor, they want to 23 block it because they know that -- basically that 24 is our response to their evidence, and they want 25 to block this witness because it's very difficult</p> <p style="text-align: right;">Page 154</p>	<p>1 try to put Finch on the stand to offer an opinion 2 as to the economic benefits of these second 3 mortgage loans. Mr. Finch testified that these 4 economic -- or that the borrowers obtained an 5 economic benefit in the form of a tax deduction or 6 may be able to.</p> <p>7 Missouri law is clear, I think the law across 8 the country is clear, that not only does that not 9 provide a defense in this case, whether they got a 10 tax deduction or not doesn't have anything to do 11 with any of the claims that were made; and 12 secondly, the tax issues and tax deductibility of 13 any recovery as a matter of law is inadmissible 14 and excluded, it's irrelevant, it's unfairly 15 prejudicial, etc.</p> <p>16 The second aspect of Mr. Finch's opinions 17 concern the interest savings. And what Mr. Finch 18 wants to do is say, well, they traded out, that 19 the borrowers traded out what was in effect 20 unsecured credit card debt, and then they took 21 that debt and wrapped it into their home diverting 22 it to a secured debt at a lower interest rate. 23 And again he says that was an economic benefit to 24 the borrowers. For the same reasons that should 25 be excluded, such a benefit, and it doesn't exist,</p> <p style="text-align: right;">Page 156</p>
<p>1 for them to deal with it. Because they want to 2 use this document, they want to basically give 3 their version without any witnesses testifying 4 about those documents or how they were -- a person 5 actually involved in the transaction, okay, with 6 respect to these 256 loans that my client 7 purchased. So they are offering their version of 8 the events. We need to be able to respond to that 9 with this witness and our other witnesses.</p> <p>10 THE COURT: Anything else?</p> <p>11 MR. SKEENS: No, Your Honor.</p> <p>12 MR. ARNOLD: Not on that issue.</p> <p>13 THE COURT: Plaintiffs' motion in limine 14 No. 1 is sustained.</p> <p>15 Motion in limine No. 2.</p> <p>16 MR. RICHARDS: Your Honor, motion in 17 limine No. 2 deals with one of defendants' 18 experts. This one is Charles Finch. Mr. Finch is 19 an accountant and the bulk of his opinions are 20 basically to counter or run some counter 21 calculations to the Plaintiffs' expert Jack 22 Krueger.</p> <p>23 However, in addition to those counter 24 calculations, as I call them, the defendants may, 25 and I don't know if they intend to, but they may</p> <p style="text-align: right;">Page 155</p>	<p>1 you are trading out unsecured debt for secured 2 debt. And there is a whole number of reasons why 3 these borrowers could have made the loans without 4 charging all these fees, and having accomplished 5 that --</p> <p>6 THE COURT: Let's just stop you right 7 there. Does the defense intend to put on 8 Mr. Finch to state that these loans were actual 9 benefits to the borrowers, yes or no?</p> <p>10 MR. WILLIS: Yes, we do, Your Honor.</p> <p>11 THE COURT: How does this aid in your 12 defense?</p> <p>13 MR. WILLIS: There is a number of 14 reasons why these benefits, these economic 15 benefits, are relevant to the case. First of all, 16 it's relevant to the issue of damages. As to say 17 actual damages under the SMLA is not defined. The 18 case law should shed some light as to how you 19 determine economic damages or actual damages and 20 one of those things are the benefits versus the 21 cost of the transaction.</p> <p>22 THE COURT: Where do you find that?</p> <p>23 MR. WILLIS: There is actually case law, 24 Your Honor. We have cases with us here today, but 25 basically there are cases that say, in determining</p> <p style="text-align: right;">Page 157</p>

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<p>1 actual damages one of the things you look at is</p> <p>2 the benefits of the transaction versus the cost of</p> <p>3 the transaction. The benefits in terms of the tax</p> <p>4 savings as well as a reduction of an interest rate</p> <p>5 from a high credit card rate down to a lower</p> <p>6 second mortgage rate is an economic benefit</p> <p>7 bestowed upon the Plaintiffs. It's relevant to</p> <p>8 that issue, Your Honor.</p> <p>9 THE COURT: It's almost sounding like</p> <p>10 you are trying to assert a mitigation of damages.</p> <p>11 MR. WILLIS: It's not really. I</p> <p>12 understand, Your Honor. Because it's sort of a</p> <p>13 different case, I can understand the Court's query</p> <p>14 about this. But it's really not a mitigation of</p> <p>15 damages question, it's really a matter of how the</p> <p>16 jury measures the amount of damages. And again,</p> <p>17 it's a situation just like you do in any</p> <p>18 transaction, you look at the benefits, you look at</p> <p>19 the costs.</p> <p>20 THE COURT: Have you looked at our</p> <p>21 instructions on measure of damages? MAI is pretty</p> <p>22 instructive on measure of damages and I don't</p> <p>23 recall ever seeing benefits to a borrower being</p> <p>24 one of those elements.</p> <p>25 MR. WILLIS: What the jury is actually</p> <p style="text-align: right;">Page 158</p>	<p>1 take into consideration is when the borrowers</p> <p>2 borrowed this money and the fees were disclosed to</p> <p>3 them, did they evaluate this transaction with</p> <p>4 regard to the economic benefits bestowed upon</p> <p>5 them? And to the extent that the transaction</p> <p>6 actually reduces interest rate and to the extent</p> <p>7 that these people were motivated by tax savings,</p> <p>8 then basically both the Missouri Supreme Court --</p> <p>9 I'm sorry, the Missouri Court of Appeals as well</p> <p>10 as the United States Supreme Court says you have</p> <p>11 to look at the totality of the transaction.</p> <p>12 It's not fair to basically say that these are</p> <p>13 the -- there is one aspect of damages and you</p> <p>14 should apply some kind of multiplier. You have to</p> <p>15 look at the totality of the transactions. So for</p> <p>16 those two reasons, Your Honor, we think it's</p> <p>17 relevant.</p> <p>18 MR. RICHARDS: The only thing I would</p> <p>19 say, Your Honor, is if this was a personal injury</p> <p>20 case, they could try and come up here and say,</p> <p>21 well, the Plaintiffs' ability to recover medical</p> <p>22 expenses that they incurred gave some benefit to</p> <p>23 them because they exceeded the AGI limits and were</p> <p>24 deducted out of their tax returns and they went to</p> <p>25 this particular doctor or that -- you're right,</p> <p style="text-align: right;">Page 160</p>
<p>1 going to have to make a determination on is what</p> <p>2 is the amount of damages. Then one of the things</p> <p>3 they take into account is the benefits versus the</p> <p>4 cost of the transaction. We do intend to assert</p> <p>5 it for that purpose.</p> <p>6 There is also another very significant</p> <p>7 purpose, Your Honor, with regard to the issue of</p> <p>8 punitive damages. Both the United States Supreme</p> <p>9 Court as well as several Missouri cases address</p> <p>10 the amount of punitive damages, saying that you've</p> <p>11 got to look at the entire economic circumstance of</p> <p>12 the transaction. You've got to -- you just don't</p> <p>13 focus on one specific element, you look at the</p> <p>14 benefits that are bestowed upon the Plaintiff by</p> <p>15 reason of how the transaction affected them.</p> <p>16 So, for example, one of the things that is</p> <p>17 going to be argued in the case is, were there</p> <p>18 overcharges on second mortgage rates. To the</p> <p>19 extent that the borrowers in this case, and</p> <p>20 frankly, Your Honor, I don't think there is any</p> <p>21 dispute about the fact that all the fees charged</p> <p>22 were specifically disclosed in writing to all the</p> <p>23 borrowers in this case. I don't think there is</p> <p>24 going to be any dispute about that.</p> <p>25 But one of the things the jury is entitled to</p> <p style="text-align: right;">Page 159</p>	<p>1 the instruction does not say we get to factor in</p> <p>2 benefits or that evidence of -- economic evidence</p> <p>3 of a benefit is in any way admissible.</p> <p>4 With regard to the claim for punitive</p> <p>5 damages, the Supreme Court opinion doesn't say</p> <p>6 that inadmissible evidence concerning the benefits</p> <p>7 of a transaction can be considered, and that is</p> <p>8 what we have here. For the reasons that we have</p> <p>9 said, you know, this idea of a benefit conveyed to</p> <p>10 these people should be excluded. It's undisputed.</p> <p>11 I think that that is the law.</p> <p>12 THE COURT: Anything else?</p> <p>13 MR. WILLIS: One additional thing I</p> <p>14 think is pretty important to draw the Court's</p> <p>15 attention to. I'm going to show you, if I can</p> <p>16 invite the Court's attention, this is a Missouri</p> <p>17 Court of Appeals case, it's Moore versus</p> <p>18 Missouri-Nebraska Express, 892 S.W. 2d 696 out of</p> <p>19 the Western Court of Appeals, 1994 decision. If I</p> <p>20 can, Your Honor, we have highlighted some of the</p> <p>21 language in the case.</p> <p>22 What I would like to invite the Court's</p> <p>23 attention to, you see in the pink highlight there,</p> <p>24 it talks about you have to look at the entire</p> <p>25 transaction when assessing punitive damages. But</p> <p style="text-align: right;">Page 161</p>

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<p>1 one of the things the Missouri Court of Appeals 2 says -- 3 THE COURT: It's addressing mitigating 4 circumstances. 5 MR. WILLIS: Exactly. 6 THE COURT: Didn't I say this sounds 7 like -- 8 MR. WILLIS: On punitive damages, Your 9 Honor, the evidence and the benefits is 10 admissible. Perhaps on actual damages it may not 11 be, Your Honor, but on punitive damages the 12 evidence of mitigation of circumstances is 13 admissible, because again, it's consistent with 14 this entire notion. You have to look at the 15 totality of the circumstances. You can't just 16 take a -- focus on one thing, you have to 17 determine whether or not basically the defendants' 18 conduct was justifiable in some respect. 19 Again, we get to the point that they are 20 going to be in dispute in this case about the fact 21 that all these borrowers have these fees 22 specifically disclosed to them in writing. So the 23 jury I think is entitled to determine what 24 motivated the borrowers here. Was it the benefits 25 they received both in terms of interest reductions</p> <p style="text-align: right;">Page 162</p>	<p>1 offer -- 2 THE COURT: My concern is you are almost 3 suggesting that in a case like this the Plaintiffs 4 have a duty to mitigate their damages. These 5 people took out loans probably with the 6 understanding, I mean, most people take out loans 7 because they do want to reap a benefit, they want 8 to get out from a higher interest rate, they want 9 to, you know, secure an interest rate and avoid 10 credit card, that's a given. 11 To state that under the law they are required 12 to come in with that kind of mitigating evidence, 13 that doesn't exist in this lawsuit. I don't 14 understand how this evidence comes in, A, as a 15 defense; and B, as a mitigation of damages, 16 especially in actual damages, not taking away the 17 punitive damage aspect, which has been bifurcated. 18 I think I saw a motion asking for bifurcation. So 19 that's a separate element that is not going to 20 become a part of the case in chief. 21 I really am struggling to understand how you 22 can assert or bring in evidence that these 23 people -- or that you, maybe that is what you are 24 trying to argue -- that the defendants should not 25 have a verdict against them because these people,</p> <p style="text-align: right;">Page 164</p>
<p>1 as well as tax savings. 2 THE COURT: Anything else? 3 MR. RICHARDS: The only other thing, and 4 maybe this is so obvious, Your Honor, that I 5 didn't say it. If you look at the statute, the 6 statute lays out what the damages are. 408.562 7 says, you shall recover your actual damages, and 8 under established Missouri law those actual 9 damages do not include a benefit. And they want 10 to argue that -- I don't even know how they would 11 show a benefit with any degree of certainty in 12 arguing that punitive damages shouldn't be 13 assessed. It is mitigation of damages and it is 14 inadmissible and that opinion from the Supreme 15 Court doesn't say we are going to allow otherwise 16 inadmissible evidence to be considered by a jury 17 in determining punitive damages. 18 MR. WILLIS: One final note, Your Honor, 19 with regard to how it's going to be demonstrated. 20 Our expert Mr. Finch has actually gone through 21 calculations, he has actually ground through the 22 numbers, he testified about those in his 23 deposition and it's marked as an exhibit. So it's 24 not speculation. He has actually gone through and 25 calculated the benefits and he's prepared to</p> <p style="text-align: right;">Page 163</p>	<p>1 irrespective of any violations of law, gained a 2 benefit. That is what it's sounding like to me. 3 Is that what you are really asserting? 4 MR. WILLIS: Let me see if I can break 5 that down for the Court. As I understand your 6 comment, it sounds like you are willing to at 7 least entertain the possibility that we might be 8 able to submit with regard to punitive damages. 9 THE COURT: I have to look at this case. 10 I was just looking at the facts and they are not 11 really identical at all. There are two issues 12 here. You are saying yes, it's important in 13 punitive damages, but I can't -- let's just talk 14 about case in chief. 15 MR. WILLIS: Actual damages, 16 Mr. Richards is right, the Missouri SMLA says that 17 the jury determines the amount of actual damages. 18 What the problem is, Your Honor, is that the SMLA 19 does not define what actual damages are. So if 20 you look back at the case law, what it basically 21 says is a matter of comparing the benefits versus 22 the cost. I think the jury is entitled to make a 23 determination. For example, the jury is entitled 24 to make a determination. 25 One of the things they want to do, Your</p> <p style="text-align: right;">Page 165</p>

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<p>1 Honor, is they want to recover all of the past 2 interest that has been paid in the case. That is 3 part of the claim that they are making in this 4 case. Even though the past interest was fully 5 disclosed to borrowers, even though it was 6 disclosed to the borrowers in writing, and even 7 though presumably that is the very reason they are 8 taking out the loan in the first place.</p> <p>9 To the extent they want to penalize the 10 defendants in this case by having them pay back 11 all of the past interest in this case, one of the 12 things I think the jury is entitled to take into 13 consideration is these people, did they get some 14 benefits. Before we penalize these people who 15 bought these loans, shouldn't the jury take into 16 account what benefit motivated these people before 17 you are going to punish or penalize or have the 18 defendants disgorge all of the past interest in 19 the case.</p> <p>20 THE COURT: I don't think that is 21 relevant to an issue of whether or not these 22 defendants violated a law and unnecessarily 23 assessed fees. That has no bearing on whether or 24 not these borrowers gained a benefit. I don't see 25 it at this time. These are motions in limine.</p> <p style="text-align: right;">Page 166</p>	<p>1 on this issue?</p> <p>2 THE COURT: Sure.</p> <p>3 MR. RUSKAMP: Part of this issue really 4 does require some context, and what I would like 5 to suggest to the Court is that it's important to 6 ultimately understand what we expect the 7 Plaintiffs' case in chief to be on this issue, 8 particularly as Mr. Willis' points were related to 9 punitive damages.</p> <p>10 What we are faced with here really is an 11 effort to put evidence in I anticipate in their 12 case in chief that is largely unrelated to 13 anything these defendants did. And frankly, 14 largely unrelated to anything having to do with 15 the loans in this case. Things like guilty pleas 16 on other issues, alleged violations by MCR with 17 respect to the origination of loans that has 18 nothing at all to do with the Missouri loans or 19 the violation or alleged violation of the Missouri 20 statute.</p> <p>21 THE COURT: Are you talking about your 22 other motions in limine regarding the two 23 convicted felons?</p> <p>24 MR. RUSKAMP: I'm talking about that but 25 also just from a broader perspective. What the</p> <p style="text-align: right;">Page 168</p>
<p>1 I'm going to sustain it right now. Unless you can 2 prove to me with some concrete on point case law, 3 I just don't think it's appropriate.</p> <p>4 MR. WILLIS: Your Honor, can I ask a 5 clarification question here? With regard to the 6 admissibility benefits on the punitive damage 7 phase, will the Court allow us to come back and 8 readdress that issue?</p> <p>9 THE COURT: As I said, motions in limine 10 are preliminary rulings. If you find something 11 somewhere that requires me to reconsider any of 12 the rulings that I make today I will be happy to 13 do that.</p> <p>14 MR. WILLIS: Thank you, Your Honor.</p> <p>15 THE COURT: No. 3.</p> <p>16 MR. RICHARDS: Your Honor, motion in 17 limine No. 3 is motion in limine No. 2 except it's 18 expanded to include anybody else. No evidence 19 regarding alleged benefits. It's not limited to 20 Chuck Finch, it's limited to anybody else that 21 might jump in the box.</p> <p>22 THE COURT: Is that understood?</p> <p>23 MR. WILLIS: Our response would be the 24 same, Your Honor.</p> <p>25 MR. RUSKAMP: Your Honor, may I be heard</p> <p style="text-align: right;">Page 167</p>	<p>1 Plaintiffs' case in chief will ultimately be is 2 not just simply the HUD-1s and these fees. There 3 is going to be sort of a second wave that comes in 4 by way of an expert named Rebecca Walzak and Margo 5 Saunders, and what I would like to respectfully 6 suggest to the Court, that on this benefit issue 7 what we are really talking about here is having a 8 fair and balanced perspective on our ability to 9 present to the jury a full picture on what the 10 circumstances are.</p> <p>11 Now, if all of that extraneous criminal 12 convictions and these defendants are bad guys 13 doesn't come in, then I think questions about 14 benefit and issues about benefit may -- the points 15 may very well be well taken, but otherwise, you 16 truly are creating a situation where the 17 Plaintiffs are going to off load all of this 18 information into the case and the defendants are 19 left without really anything at all to say.</p> <p>20 THE COURT: Mr. Ruskamp, I don't really 21 know what you want me to say in response to that 22 sort of global request. I don't know what the 23 Plaintiffs intend to drag in or what issues you 24 are concerned about, and if you have concerns 25 specifically raise them now because that is what</p> <p style="text-align: right;">Page 169</p>

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<p>1 off of work to sit here, just like everybody else, 2 and that is about it, Your Honor. 3 MR. ARNOLD: Your Honor, we are not 4 going to dispute any of that. It's not going to 5 be a matter for the jury to decide. It's for the 6 Court to decide if it's going to be awarded and it 7 shouldn't be put before the jury. 8 MR. MARTIN: I'll join. 9 MR. RUSKAMP: Yes. 10 THE COURT: I don't see the relevance. 11 Sustained. 12 (The proceedings returned to open court.) 13 Q. (By Mr. Skeens) Mr. Mitchell, what do you -- what 14 would you like to recover on behalf of yourself 15 and the class? 16 A. For myself and the rest of the class members we 17 would just like to recover what is allowable under 18 the law, whatever that might be, but whatever is 19 allowable under the law. 20 MR. SKEENS: Thank you. 21 THE COURT: Cross? 22 CROSS-EXAMINATION 23 BY MR. ARNOLD: 24 Q. Mr. Mitchell, just very briefly. My name is Roy 25 Arnold and I represent Residential Funding. I</p> <p style="text-align: right;">Page 1089</p>	<p>1 were. 2 Q. Do you know as a class representative how many of 3 the loans were purchased by Household? 4 A. I believe my attorney told me at one time. I 5 think it was about 34 or 35, something like that. 6 Q. And your testimony is that you didn't have any 7 contact with anybody at Household in connection 8 with this particular loan from MCR; is that right? 9 A. I didn't have any contact with them directly, no. 10 Q. You haven't had any contact with any borrowers 11 whose loans were purchased by Household that were 12 originated by MCR, have you? 13 A. No, just other than some of the work that was 14 filed with the Court early on I read through it, I 15 briefed through it and some were. But other than 16 reading that, no, I didn't talk to them 17 personally, no. 18 Q. You haven't had any discussions with them? 19 A. That's correct. 20 Q. You don't know anything about the circumstances of 21 the closing of their loans? 22 A. No, I don't. 23 Q. And is it the case that you had a prior loan with 24 Household in your past? 25 A. Way back when I was young, yes, I believe I did,</p> <p style="text-align: right;">Page 1091</p>
<p>1 just want to make sure the record is clear on one 2 thing. You paid off your loan in late -- your MCR 3 loan in late 2001, early 2002, correct? 4 A. Correct. 5 Q. And you paid it off by obtaining a larger first 6 mortgage from Bank of America? 7 A. That is correct. 8 Q. And you then sold your home; isn't that right, in 9 Blue Springs? 10 A. No, not until many years later. In fact, about a 11 year and a half ago. 12 Q. But you paid off the loan and then you got your 13 Bank of America loan, and then you sold your 14 house, right? 15 A. Correct. 16 Q. I just wanted to make sure that was clear. Thank 17 you. No further questions. 18 THE COURT: Mr. Ruskamp? 19 MR. RUSKAMP: Thank you, Your Honor. 20 CROSS-EXAMINATION 21 BY MR. RUSKAMP: 22 Q. Mr. Mitchell, so that I'm clear on your testimony, 23 your loan was not purchased by Household, was it? 24 A. My particular loan wasn't, but it's my 25 understanding that some members of the class loans</p> <p style="text-align: right;">Page 1090</p>	<p>1 just a signature loan or something like that, a 2 collateral loan. I'm not really sure but I was 3 very young at the time. 4 Q. When you say collateral loan, you mean it was 5 secured by something? 6 A. Something, yes, probably a used car, something 7 like that. 8 Q. I assume you paid that loan off at some point in 9 time? 10 A. Yes. 11 Q. Was your experience with Household satisfactory 12 relative to that loan? 13 A. As far as I can remember, it's been so long ago, 14 but yes, I believe it was. 15 MR. RUSKAMP: Thank you, Mr. Mitchell. 16 THE COURT: Mr. Martin? 17 MR. MARTIN: Could we approach? 18 (Counsel approach the bench and the following 19 discussion was had:) 20 MR. MARTIN: I want to make sure I get 21 it clear because I know that we had some issues 22 about collateral issues, whether this is a good 23 deal for them, that kind of stuff. What I want to 24 do is ask Mr. Mitchell -- we heard this testimony 25 today about how they got this loan because they</p> <p style="text-align: right;">Page 1092</p>

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<p>1 wanted to save some money and that they were 2 saving money, I want to find out how much money, 3 and it won't take very long to do that, but if the 4 documents they lay out what they were paid before 5 and I want to just add those numbers up with him 6 and show that this is his savings.</p> <p>7 MR. SKEENS: I thought we had agreed 8 that we weren't going to have evidence about what 9 a great deal this was for any of these people or 10 anything like that. It was just about whether 11 these fees were illegal or not. I would object on 12 relevance grounds, Your Honor.</p> <p>13 MR. MARTIN: All this evidence, I'm 14 pulling it out of the documents they put in the 15 record.</p> <p>16 MR. SKEENS: I thought we had a motion 17 in limine on this that was sustained.</p> <p>18 MR. MARTIN: We did. That is why I'm 19 bringing this up. I think they opened the door. 20 I think we should have been able to get into this 21 information before. That is why you get these 22 loans, you want to save money. How much money did 23 they save. It's just the extension of what he 24 testified to on direct.</p> <p>25 THE COURT: Anything else? The</p> <p style="text-align: right;">Page 1093</p>	<p>1 BY MR. MARTIN:</p> <p>2 Q. Mr. Mitchell, I represent Wachovia. Sometimes you 3 will hear HomEq. At the time that you got your 4 loan it would have been The Money Store. Do you 5 have any information about the way that Wachovia 6 dealt with any of the borrowers or the way that 7 HomEq dealt with any of the borrowers or The Money 8 Store?</p> <p>9 A. Again, as I told the other attorney, just through 10 documents that I reviewed trying to prepare for 11 this so I would have background on the other 12 people that were involved in the class with me. I 13 seen the stampings a little bit in some of the 14 documents, but other than that, no.</p> <p>15 Q. So nothing that your loan had -- no part of your 16 loan had anything to do with Wachovia or HomEq or 17 The Money Store; is that right?</p> <p>18 A. That's correct.</p> <p>19 MR. MARTIN: I have no further 20 questions.</p> <p>21 THE COURT: Anything else?</p> <p>22 MR. SKEENS: No redirect, Your Honor.</p> <p>23 THE COURT: Sir, you may step down.</p> <p>24 (Witness excused.)</p> <p>25 THE COURT: Call your next witness.</p> <p style="text-align: right;">Page 1095</p>
<p>1 objection is overruled. Your request is denied. 2 I can't let you get into what benefits these 3 parties obtained as a result of the loan. I'm 4 sticking to my ruling on the motion in limine. He 5 didn't open the door. He went through a document 6 explaining the purpose of the loan. That is the 7 extent of the testimony.</p> <p>8 MR. MARTIN: Can I have like 30 seconds 9 to make an offer of proof on this?</p> <p>10 THE COURT: Right now?</p> <p>11 MR. MARTIN: Yes.</p> <p>12 THE COURT: Sure.</p> <p>13 MR. MARTIN: He had a loan from Concord 14 where he was paying \$62 a month. He had a loan 15 from MBNA where he was paying \$181 a month. He 16 had A loan from Discover Financial he was paying 17 \$134 a month. All total that was \$477 a month. 18 His new payment was \$236.71. The savings to him 19 was \$240.29. All that is in the records that they 20 just introduced into evidence.</p> <p>21 THE COURT: You made your offer of 22 proof. I'm going to maintain my ruling. You may 23 proceed.</p> <p>24 (The proceedings returned to open court.)</p> <p>25 CROSS-EXAMINATION</p> <p style="text-align: right;">Page 1094</p>	<p>1 MR. SKEENS: The Plaintiffs at this time 2 call Ruth Mitchell, Your Honor.</p> <p>3 THE COURT: Step up into the witness 4 box. Raise your right hand.</p> <p>5 RUTH E. MITCHELL, 6 having been sworn by the Court testifies as follows: 7 DIRECT EXAMINATION</p> <p>8 BY MR. SKEENS:</p> <p>9 Q. Can you tell us your name?</p> <p>10 A. Ruth E. Mitchell.</p> <p>11 Q. Mrs. Mitchell, you are likewise a Plaintiff in 12 this case?</p> <p>13 A. Yes.</p> <p>14 Q. Along with your husband Steve?</p> <p>15 A. Correct.</p> <p>16 Q. And are you here on behalf of the class in 17 addition to yourself?</p> <p>18 A. Yes, I am.</p> <p>19 Q. Where are you from originally, Mrs. Mitchell?</p> <p>20 A. A little town in Illinois called Belleville, 21 Belleville, Illinois.</p> <p>22 Q. Obviously at some point you end up in Kansas City. 23 When was that?</p> <p>24 A. Late '89, early 1990.</p> <p>25 Q. And when did you and Steve -- you and Mr. Mitchell</p> <p style="text-align: right;">Page 1096</p>

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<p>1 what you said?</p> <p>2 A. It would be catastrophic circumstances, yes.</p> <p>3 Q. And that was your description of the catastrophic</p> <p>4 circumstances?</p> <p>5 A. That would be one example. I think that is one we</p> <p>6 can all somewhat understand.</p> <p>7 MR. WALTERS: No further questions.</p> <p>8 THE COURT: Anything else?</p> <p>9 MR. ARNOLD: No, Your Honor.</p> <p>10 THE COURT: Sir, you may step down.</p> <p>11 (Witness excused.)</p> <p>12 THE COURT: Ladies and gentlemen of the</p> <p>13 jury, we are going take a lengthy recess. We will</p> <p>14 be in recess until 1:30 today. Have a good</p> <p>15 afternoon.</p> <p>16 (The following proceedings were had in the</p> <p>17 courtroom out of the presence of the jury:)</p> <p>18 MR. WILLIS: We are going to talk about</p> <p>19 these proffers on Mr. Finch's testimony. What I</p> <p>20 propose to do is we have got a number of these</p> <p>21 written proffers. We have got them marked with</p> <p>22 exhibit stickers here, and I thought I would just</p> <p>23 hand those written proffers up to the Court, sort</p> <p>24 of summarize our position, Mr. Richards can give</p> <p>25 his response to it, and then the Court can rule on</p> <p style="text-align: right;">Page 3326</p>	<p>1 appropriate.</p> <p>2 THE COURT: This is really an offer of</p> <p>3 proof, correct?</p> <p>4 MR. WILLIS: Yes, it's a proffer of what</p> <p>5 we expect Mr. Finch's opinion would be.</p> <p>6 THE COURT: And I have already sustained</p> <p>7 this. So I will just put on this document that</p> <p>8 it's sustained as well.</p> <p>9 MR. MARTIN: Your Honor, just for the</p> <p>10 record --</p> <p>11 THE COURT: Or overruled, I should say.</p> <p>12 Sorry.</p> <p>13 MR. MARTIN: I would like to join in the</p> <p>14 set of proffers on behalf of Wachovia Equity</p> <p>15 Servicing. I also think that for all of these --</p> <p>16 THE COURT: I think you are all signed</p> <p>17 off on these.</p> <p>18 MR. MARTIN: Okay. And I think also,</p> <p>19 especially with regard to the testimony we just</p> <p>20 heard about defaults and default rates and</p> <p>21 assuming what percentage of these folks defaulted,</p> <p>22 I think all this evidence should come in directly.</p> <p>23 They have clearly opened the door. We have been</p> <p>24 talking about default rates with multiple</p> <p>25 witnesses and this one exactly.</p> <p style="text-align: right;">Page 3328</p>
<p>1 them.</p> <p>2 The first proffer we have has been marked as</p> <p>3 Exhibit 1148. It is an opinion with regard to</p> <p>4 borrowers who should be excluded from the class.</p> <p>5 Mr. Finch is prepared to give an opinion that</p> <p>6 certain borrower's damages should be excluded by</p> <p>7 reason of bankruptcy, discharge or write-off or</p> <p>8 death.</p> <p>9 The Court has already ruled in response to</p> <p>10 motions for summary judgment and motions in limine</p> <p>11 that this should be excluded. So we are</p> <p>12 proffering Exhibit 1148 as our proposed evidence</p> <p>13 on Mr. Finch's opinion with regard to the</p> <p>14 borrowers who should be excluded from the class.</p> <p>15 MR. RICHARDS: Your Honor, for the</p> <p>16 record, and I didn't catch the exhibit number on</p> <p>17 that.</p> <p>18 MR. WILLIS: 1148.</p> <p>19 MR. RICHARDS: For this and each of the</p> <p>20 other proffers we disagree, I think I need to</p> <p>21 state for the record, we disagree with the</p> <p>22 recitation that they put in the background section</p> <p>23 of each of these. Having said that, with regard</p> <p>24 to Exhibit 1148, we do object to the opinions as</p> <p>25 proffered and don't believe that they are</p> <p style="text-align: right;">Page 3327</p>	<p>1 THE COURT: Anything else?</p> <p>2 MR. RICHARDS: No.</p> <p>3 THE COURT: The ruling will remain.</p> <p>4 MR. WILLIS: Next we have Exhibit 1156.</p> <p>5 Exhibit 1156, Your Honor, is the proffer by the</p> <p>6 defendants of Mr. Finch's opinion with regard to</p> <p>7 the so-called benefits to the borrowers. If</p> <p>8 allowed to testify Mr. Finch would give an opinion</p> <p>9 that the various Plaintiff borrowers in the case</p> <p>10 derived certain benefits by reason of these loans</p> <p>11 in the form of either interest rate deductions,</p> <p>12 tax savings or cash flow savings.</p> <p>13 Again, just for the record, the Court I think</p> <p>14 has ruled in response to motions in limine filed</p> <p>15 by the Plaintiffs in the case that benefits to the</p> <p>16 borrowers should not come into the case. So we</p> <p>17 are proffering Exhibit 1156 on that basis.</p> <p>18 MR. RICHARDS: We don't dispute what he</p> <p>19 said there. That that is the Court's ruling, and</p> <p>20 we believe it's inappropriate.</p> <p>21 THE COURT: That will be overruled.</p> <p>22 MR. MARTIN: Next, Your Honor, we have</p> <p>23 Exhibit 1149. Exhibit 1149 is Mr. Finch's</p> <p>24 opinions with regard to the so-called discount</p> <p>25 fees. And if allowed to testify Mr. Finch would</p> <p style="text-align: right;">Page 3329</p>